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SRI PELAGAT SDN BHD

v.

MALAYSIAN WETLANDS FOUNDATION

B

HIGH COURT MALAYA, KUALA LUMPUR
HADHARIAH SYED ISMAIL JC
[SUIT NO: D9(D4)-22-7-2007]
25 SEPTEMBER 2009

C ***CONTRACT:*** *Building contract - Termination of - Claim for balance contract sum - Time to commence proceedings - Limitation of action - Architect's certificates, interim and final - Finality of Architect's certificates*

LIMITATION: *Contract - Building contract - Termination of - Claim* D *for balance contract sum - Time to commence proceedings - Limitation of action - Architect's certificates, interim and final - Finality of Architect's certificates*

By an agreement in writing dated 18 October 1999 entered into between the plaintiff and the defendant ('the Agreement'), the E defendant had appointed the plaintiff as the main contractor for the construction and completion of a project known as the "Proposed Resort in Paya Indah Sanctuary in Kuala Langat, Selangor ('the Project') for the total cost of RM11,123,757.84. The rights and liabilities of the parties are spelt out in the terms and conditions F contained in the agreement.

The original contract sum was subsequently reviewed to a new contract sum of RM 8,735,274.52. The said contract is a Bill of Quantities Contract which is subjected to final measurement of G the works carried out by the plaintiff. All payments to the plaintiff must be certified by the Superintending Officer. In this case the Superintending Officer appointed for the said project is Architect Senibahri. A total of sixteen (16) payment certificates were issued by Architect Senibahri. Certificates No. 1 to 15 are labeled as H Interim Certificates whilst Certificate No. 16 is referred to as Final Certificate. The total amount valued by the said Architect in regard to interim certificates No. 1 to 15 was RM7,510,605.36 of which the defendant has admitted having paid RM6,679,499.31 leaving a balance sum of RM831,106.05 remaining unpaid. Whereas under I final certificate No. 16, the total amount was valued at RM821,722.60 and no payment was made by the defendant.

Hence the total sum of RM1,652,828.65. The was no dispute with regard to the sums stated in all the certificates. Parties agreed that they are bound by the certificates. Apart from raising the issue of limitation, the defendant denied liability on the ground they have paid the full amount for certificate No. 1 to 15, whilst the amount claimed under certificate No. 16 was premature.

After numerous requests made for payment in vain, the plaintiff had, *vide* its letter of 16 November 2000 intimated to the defendant, the plaintiff's decision to "terminate" the agreement. The defendant, however, did not accept the "termination" of the agreement by the plaintiff and gave its notice dated 14 February 2001 to the plaintiff terminating the agreement.

The plaintiff filed the claim as against the defendant on 3 January 2007. The defendant raised the plea of limitation contending that the limitation period of six years under s. 6(1) of the Limitation Act 1953 started to commence from 16 November 2000, and accordingly the time for the plaintiff to initiate the claim expired on 16 November 2006.

Held (for the plaintiff):

(1) It is settled law that, when a defendant raises the issue of limitation, the onus lies on the plaintiff to prove that his cause of action accrued within the statutory period.

(2) The plaintiffs letter dated 16 November 2000 "terminating" its agreement with the defendant is in truth an intimation by the plaintiff of its intention not to be bound by the agreement anymore and accordingly an act of repudiation of the agreement by the plaintiff which repudiation was not accepted by the defendant.

(3) The plaintiffs letter dated 16 November 2000 though stated to be the letter of termination of the agreement is not a termination letter by reason of the defendant's letter of 14 February 2001 terminating the agreement pursuant to cl. 51 of the agreement dated 18 October 1999.

(4) By issuing the termination letter of 14 February 2001 the defendant must be taken to admit that the agreement was continuing and subsisting as at that date.

(5) As the agreement can only be terminated by the defendant by virtue of cl. 51 of the agreement, for purposes of limitation the time started to run from 14 February 2001, and six (6) years will expire on 14 February 2007.

(6) The defendant having pleaded in its defence an admission that a sum of RM6,679,499.31 only have been paid to the plaintiff on the Architect Certificates cannot turn around and say it has paid a sum of RM7,570,605.36 departing from the defence.

(7) Since both parties did not dispute the validity and amounts mentioned in the interim and final certificates, on the authority of *L'Grande Development Sdn Bhd v. Bukit Cerakah Development Sdn Bhd* the plaintiff is entitled to receive full payment of the sum as stated in all the said certificates, and the defendant must pay to the plaintiff the balance sum due and owing on the interim certificates 1-15 and final certificate No. 16 in the sum of RM1,626,828.65 and interest at the rate of 8% per annum on the said sum from the date of judgment till settlement and costs.

Case(s) referred to:

Anjalai Ammal & Anor v. Abdul Kareem [1969] 1 MLJ 22
KEP Mohamed Ali v. KEP Mohamed Ismail [1981] 2 MLJ 10
L' Grande Development Sdn Bhd v. Bukit Cerakah Development Sdn Bhd [2007] 8 CLJ 507 HC
Ong Ah Bee v. Hii Chung Siong, Robin [1993] 1 CLJ 504 HC
Yorkshire Provident Life Assurance Co v. Gilbert & Rivington [1895] 2 QB 114

Legislation referred to:

Civil Law Act 1956, s. 11
Limitation Act 1953, s. 6(1)

For the plaintiff - Ranjan Chandran; M/s Ranjan Chitravathy & Nik
For the defendant - Jennifer Chandran; M/s Vaasan Chan & Chandran

Reported by Ranjan Chandran

JUDGMENT

Hadhariah Syed Ismail JC:

[1] Plaintiff, a building contractor sued the defendant for the payment of the balance contract sum allegedly due and owing to them. The defendant denied liability.

Plaintiff's Claim

[2] As per para 17 of the statement of claim, the plaintiff's claims are as follows:

(i) RM1,652,828.65;

(ii) Interest under s. 11 of the Civil Law Act 1956; or

(iii) Interest at 8% per annum on the judgment sum from the date of judgment to the date of payment;

(iv) The defendant forthwith cancelled the performance bond dated 1 July 1999;

(v) Damages; and

(vi) Costs.

[3] In the midst of the trial, the plaintiff withdrew prayer (iv) above.

Brief Facts

[4] By an agreement in writing dated 18 October 1999 entered into between the plaintiff and the defendant, the defendant had appointed the plaintiff as the main contractor for the construction and completion of a project known as the "Proposed Resort in Paya Indah Sanctuary in Kuala Langat, Selangor (the project) for the total cost of RM11,123,757.84. The rights and liabilities of the parties are spelt out in the terms and conditions contained in the agreement.

[5] The original contract sum was subsequently reviewed to a new contract sum of RM8,735,274.52. The said contract is a Bill of Quantities Contract which is subjected to final measurement of the works carried out by the plaintiff. All payments to the plaintiff must be certified by the Superintending Officer. In this case the

Superintending Officer appointed for the said project is Architect Senibahri. A total of sixteen (16) payment certificates were issued by Architect Senibahri. Certificates No 1 to 15 are labelled as Interim Certificates whilst Certificate No. 16 is referred to as Final Certificate. The total amount valued by the said Architect in regard to interim certificates No. 1 to 15 was RM7,510,605.36 of which the defendant has admitted having paid RM6,679,499.31 leaving a balance sum of RM831,106.05 remain unpaid. Whereas under final certificate No. 16, the total amount was valued at RM821,722.60 and no payment was made by the defendant. Hence the total sum of RM1,652,828.65. There was no dispute with regard to the sums stated in all the certificates. Parties agreed that they are bound by the certificates. Apart from raising the issue of limitation, the defendant denied liability on the ground they have paid the full amount for certificate no. 1 to 15, whilst the amount claimed under certificate no. 16 was premature.

[6] The Issues

1. Whether the plaintiff's claim is barred by limitation.
2. If the claim is not time barred, whether the plaintiff has proved its claim.

Limitation

[7] The issue of limitation was raised by the defendant against the plaintiff in para 14 of its statement of defence. The facts said to give rise to limitation is this. The plaintiff's witness, PW1 in his evidence admitted that the plaintiff had terminated their contract with the defendant *vide* a letter dated 16 November 2000. Therefore valuation of plaintiff's work will be as at 16 November 2000. Since the plaintiff's action is founded on contract, s. 6(1) of the Limitation Act 1953 applies. Counsel for the defendant submit limitation period of six years starts to run from 16 November 2000 and expires on 16 November 2006. As the plaintiff's claim is filed in court only on 3 January 2007, the claim is time barred.

[8] Now, it is settled law that when a defendant raises the issue of limitation, the onus lies on the plaintiff to prove that his cause of action occurred within the statutory period. This principle is stated in the case of *Ong Ah Bee v. Hii Chung Siong, Robin* [1993] 1 CLJ 504 where it was held:

Now it has been held that when the defence of limitation is raised, the burden of pleading and proving that the action was brought within the limitation period shifts to the plaintiff.

[9] In reply, counsel for the plaintiff had this to say. PW1 has said that the letter of 16 November 2000 was issued after numerous requests for payment made by the plaintiff to the defendant failed. Not accepting the plaintiff's termination, the defendant issued a letter dated 14 February 2001 to the plaintiff, officially terminating the contract between the parties. So what is the effect of the letter dated 16 November 2000. When was the contract terminated since each party has issued a termination letter. To resolve the issue, it is only fair and proper for parties to fall back on the agreement. If the letter of 16 November 2000 is to be treated as a termination letter, the agreement itself did not give the plaintiff that right. There is no provision in the agreement giving rights to the plaintiff to terminate the contract. Clause 51 of the agreement entitles only the defendant to issue a letter of termination. That is why the defendant issued the letter dated 14 February 2001. The plaintiff here are not happy to proceed with the performance of the contract because they are not paid for the work done. They have a valid and reasonable ground not to carry on with the work. So the letter of 16 November 2000 which envisage the plaintiff's intention not to be bound by the contract anymore was in truth an act of repudiation by the plaintiff which was not accepted by the defendant. If the defendant's argument is accepted in that the contract was terminated on 16 November 2000, why is there a need for the defendant to officially terminate the agreement on 14 February 2001. By issuing the termination letter dated 14 February 2001, the defendant must be taken to admit that the agreement was continuing and subsist as at that date. Eventually this court had to decide what is the effective date of termination of contract in this case. I am inclined to accept the argument put forward by counsel for the plaintiff for a simple reason that under the agreement only the defendant can terminate the contract. That being the case, for the purpose of limitation period, the operative date time start to run must be from 14 February 2001 because until that date, the defendant accepted that the agreement as still subsisting. Six years expires on 14 February 2007. This suit was filed on 3 January 2007, well within limitation period. Therefore the plaintiff has discharged the burden of proving their claim was within the limitation period.

[10] To put to rest the defendant's argument on limitation, counsel for the plaintiff has also referred this court to the defendant's letter dated 8 December 2000 addressed to the plaintiff. The said letter had a caption "Notis untuk tujuan penamatan pengambilan kerja kontrak". The last paragraph of that letter states as follows:

> Tuan dikehendaki memulakan kerja tuan semula dalam tempoh empat-belas (14) hari dari tarikh surat ini dan menjalankan kerja dengan lebih cergas lagi atau tuan dikehendaki mengemukakan sebab-sebab yang munasabah mengapa pengambilan kerja tuan tidak patut ditamatkan. Sekiranya tuan gagal mematuhi kehendak perenggan ini, maka pihak kami adalah berhak untuk menamatkan pengambilan tuan di bawah kontrak ini sejajar dengan Fasal 51 syarat-syarat kontrak.

[11] The above statement demolished the defendant's contention that the agreement was terminated on 16 November 2000, as well as the plea of limitation. Although the plaintiff did not plead material facts and particulars in the statement of claim to rebut the allegation of limitation, with the defendant's two letters to the plaintiff referred to during the trial, there were sufficient materials before this court for it to decide that limitation has not set in. Reference was made to Federal Court decision in the case of *K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail* [1981] 2 MLJ 10. Raja Azlan Shah CJ Malaya (as DYMM Sultan Perak then was) in delivering the judgment of the case held:

> A further advantage of pleading and acknowledgement in the Statement of Claim is that the Defendant may thereby be led to refrain from raising the issue of limitation in the defence, thus narrowing the area of discovery and reducing cost … since the material facts and circumstances were not pleaded in the Statement of Claim, it should have been pleaded in the reply. Be that as it may, this aspect of the case has been satisfactorily presented and developed in the proceedings before the High Court and we think there are materials on the record from which a decision to that effect could be arrived at.

[12] In the circumstances, I conclude that the plaintiff's claim is not time barred.

Whether The Plaintiff Has Proved Its Claim

[13] Essentially, the parties agree with the figures mentioned in all the certificates. What is in dispute are these:

(i) The total amount of payment made by the defendant under certificate no. 1-15; and

(ii) Whether the claim under certificate no. 16 is premature.

[14] In para 5 of the statement of defence, the defendant had admitted that they have paid a sum of RM6,679,499.31 only for certificate no. 1-15. But the defendant's witness, DW1 upon cross-examination gave the following evidence:

S: Daripada pembacaan perenggan 5 ms 24 Ikatan A, kamu akan bersetuju bahawa Defendan sendiri mengaku hanya RM6,679,499.31 sahaja dibayar. Betul?

A: Saya tidak setuju.

S: Sila rujuk perenggan 5 sekali lagi. Itu adalah pengakuan Defendan sendiri. Betul?

A: Betul.

[15] The above is a clear example of oral testimony contradicted with the defendant's pleaded case. The sudden change of stance was taken simply because in the Final Certificate No 16 at p 51 of bundle B, the following words appears in para 3:

> KURANGKAN Bayaran Interim yang terdahulu No. 1-15- RM7,510,605.36.

[16] In reliance of those words, the defendant, through their witness, DW1 now say the defendant have paid the full amount for certificate no. 1-15.

[17] But when DW1 was asked whether he can produce any invoice to show such a sum was paid, his obvious answer was no. Despite what DW1 has said, there is also a point of law involved and that is the parties are bound by their pleading. Under this rule, parties cannot depart from their pleading. Having pleaded a certain sum, the defendant cannot now say they have paid more than what has been pleaded. If it is true that they have paid

more, then the defendant should have amended their defence. The approach taken by counsel for the defendant is totally wrong and against the accepted rule of law. In the case of *Anjalai Ammal & Anor v. Abdul Kareem* [1969] 1 MLJ 22, the Federal Court has stressed the importance of pleadings not only to the parties to the suit but also to the trial judge. One of the English cases referred to in *Anjalai*'s case is *Yorkshire Provident Life Assurance Co v. Gilbert & Rivington* [1895] 2 QB 114, where Lindley LJ says:

> What is the effect of these particulars? I take it the effect of these particulars is this, that the issues to be tried are limited by these particulars in the first instance. I do not mean to say that leave cannot be obtained to add to the particulars-of course it can; but the moment these particulars are delivered, and until some further order is obtained for the delivery of further particulars, the effect of delivering the particulars is to cut down the matters in question in the action to the particulars.

[18] In this case, having pleaded an admission that a sum of RM6,679,499.31 have been paid, the defendant cannot turn around and say they have paid a sum of RM7,510,605.36. The plaintiff have itemized in detail each and every payment made by the defendant, the total of which comes to RM6,679,499.31. DW1 cannot produce any invoice to prove a sum of RM7,510,605.36 have been paid. In the circumstances, I reject the argument put forward by counsel for the defendant that the defendant had paid RM7,510,605.36. The wording in para 3 of certificate no. 16 *per se* relied upon by the defendant does not constitute proof that the defendant have paid the amount mentioned therein. That para only meant to say that the total amount to be paid for certificate no. 1 to 15 is RM7,510,605.36. The only proof the defendant should produce to prove payment is a receipt which they have failed to do so. In the circumstances, I hold that the defendant have only paid the plaintiff a sum of RM6,679,499.31. Since the total amount for certificate no. 1 to 15 is RM7,510,605.36, there is a balance sum of RM831,106.05 due and owing by the defendant to the plaintiff. I therefore further hold that the defendant is liable to pay to the plaintiff the sum of RM831,106.05.

[19] With regard to the amount RM821,722.60 claimed under final certificate 16, the defendant alleged that the said payment is not due because the plaintiff have failed to comply with cl. 48(d) of the agreement. Clause 48(d) provides as follows:

(d) Dengan syarat sentiasa bahawa tiada apa-apa bayaran yang kena dibayar kepada Kontraktor di bawah Perakuan Muktamad boleh dibuat melainkan jika dan sehingga Kontraktor telah memuaskan hati PP dengan cara samaada:

(i) Suatu Akuan Statutori yang dibuat oleh atau bagi pihak kontraktor; atau

(ii) Suatu perakuan yang ditandatangani oleh atau bagi pihak Ketua Pengarah Buruh ...

[20] In reply to the defendant's submission, it is noted that the above allegation was not pleaded in the statement of defence. Furthermore, cl. 48(d) dealt with plaintiff's obligations towards the PP (Pegawai Penguasa), not the defendant. In the first place, certificate no. 16 contain the following statement:

Adalah disahkan bahawa semua peraturan kewangan dan kehendak di bawah kontrak telah dipatuhi.

[21] The above statement conclusively prove that all the requirements under the agreement have been complied with. By implication, this would necessarily include cl. 48(d). I, therefore cannot find any reason to justify the defendant's allegation that the claim here is premature. The defendant's submission on this point is rejected as it is baseless and not pleaded. Is eight (8) years after the work have been done still pre-mature? Grave injustice is done to the plaintiff and against the weight of the evidence to decide otherwise. In the circumstances, I hold that the defendant, having failed to pay the plaintiff under certificate no. 16 is liable to pay to the plaintiff a sum of RM821,722.60. In the end the combined figure of RM831,106.05 and RM821,722.60 comes to a sum of RM1,652,828.65.

Validity Of Interim And Final Certificates

[22] With regard to the validity of interim certificates, this court was referred to the case of *L' Grande Development Sdn Bhd v. Bukit Cerakah Development Sdn Bhd* [2007] 8 CLJ 507. The issue for determination in that case is with regard to the defendant's right to make deduction from the sum mentioned in the interim certificate. In determining the effect of an interim certificate, the learned High Court judge held:

A 1. That a certificate is in essence a statement of ascertained and verified facts which is to be accepted as a statement of truth at face value.

2. That the interim certificate constitutes a finality of the
B assessed value of work done by the contractor which under the terms of the construction contract obliged the employer to pay the contractor the sum certified forthwith.

3. That a certificate, once issued cannot be varied or cancelled unless agreed to by both the contractor and the employer.
C

[23] Since both parties did not dispute the validity and the amount mentioned in the interim and final certificates, I will abide the decision in *L'Grande*'s case in that with the issuance of the Architect Certificates, the plaintiff is entitled to receive full
D payment of the sums stated in all the certificates. Therefore the defendants here must pay to the plaintiff the balance sums due and owing for interim certificates No. 1 to 15 and no. 16.

Testimony Of The Defendant's Witness

E **[24]** The defendant has called one witness, En Khairul Effendi Ariffin (DW1). He was a former staff of the defendant from 1998 to 2001. In Mei 2007, he joined the defendant as a manager. He seems not to know anything about the project, the subject matter
F of this claim. This is evident from the answer he gave during cross-examination as follows:

S: Adakah kamu setuju bahawa kamu langsung tidak terlibat di dalam projek pembinaan ini?

G A: Setuju.

S: Adakah kamu setuju bahawa kamu tidak mengetahui kes ini secara terperinci?

A: Setuju.

H S: Adakah kamu juga setuju dengan cadangan saya bahawa kamu langsung tidak terlibat dengan bahagian perakaunan Defendan pada tahun 1999?

A: Setuju.

I

S: Justeru itu, adakah kamu setuju bahawa kamu tidak mempunyai pengetahuan langsung berkenaan sijil-sijil bayaran atau pun bayaran yang dibuat atas sijil-sijil bayaran tersebut. Setuju?

A: Saya setuju.

S: Saya nyatakan kepada kamu bahawa sebagai kakitangan Defendan sahaja pada tahun 1998 hingga 2001, kamu langsung tidak mempunyai pengetahuan berkenaan kegagalan penyiapan kontrak oleh Plaintiff. Setuju?

A: Setuju.

S: Kalau begitu, sila terangkan kepada Mahkamah ini apakah maksud sebenar klausa 48(d) dalam perjanjian di muka surat 31 Ikatan C ini?

A: Saya tidak boleh menerangkan maksud sebenar klausa 48 (d).

[25] With all the negative answers given by DW1, I agree with counsel for the plaintiff's submission that DW1's evidence did not support the defence case. The plaintiff's case has not been rebutted. For the reasons stated above, I hold that on the balance of probabilities, the plaintiff has proved it's claim. Judgment is given to the plaintiff as prayed for in prayer 17(i), (ii) interest at the rate of 8% per annum on RM1,652,828.65 from the date of judgment till satisfaction and (vi) costs.